IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LEVEL 3 COMMUNICATIONS, LLC, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 4:13-CV-1080 (CEJ)
	)	
ILLINOIS BELL TELEPHONE COMPANY, et al.,	)	Judge Carol E. Jackson
	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

Plaintiffs' opposition brief fails to identify any reasonable grounds for denying AT&T's motion.

A. AT&T's Motion Is Proper.

While Plaintiffs try to characterize AT&T's motion as "another bite at the apple," AT&T has made no attempt to relitigate the multitude of issues raised by the parties' summary judgment briefs. Rather, AT&T's motion addresses just two points that are not expressly addressed by the Court's order. Those two issues are (1) whether as a matter of federal law 47 U.S.C. § 415 can be tolled by private agreement, and (2) how the Court's conclusion that the Level 3 and Broadwing Texas ICAs required those Plaintiffs to bring their claims within 12 months after *Talk America* impacts disputed bills Plaintiffs received before *Talk America* as well as those it received after *Talk America*.

As to the second issue, even Plaintiffs ask for clarification (though their suggested clarification would be not so much a clarification as a reversal of the Court's decision). As to the first issue, Plaintiffs do not and cannot dispute that the Court's order does not expressly address the issue. Instead, they suggest the Court should remain silent because this is not a proper basis for requesting reconsideration under Rule 54(b). Plaintiffs are wrong.

As Plaintiffs note (at 2), one basis for reconsideration is that the initial decision was "clearly erroneous." The "clear error" standard includes circumstances where "'a court overlooks 'controlling decisions or factual matters that were put before it on the underlying motion' and which, if examined, might reasonably have led to a different result." *Corines v. Am. Physicians Ins. Trust,* 769 F. Supp. 2d 584, 593-94 (S.D.N.Y. 2011) (quoting *Eisemann v. Greene,* 204 F.3d 393, 395 n. 2 (2d Cir.2000)). Here, it does not appear the Court took into account the controlling decisions AT&T put before it holding that § 415 cannot be tolled by agreement. Addressing this issue prior to Phase II is all the more critical because "the court has jurisdiction only over claims brought within the period specified in section 415." *American Tel. & Tel. Co. v. Delta Comm'cns Corp.*, 114 F.R.D. 606, 612 (S.D. Miss. 1986).

Plaintiffs also assert (at 3-5) that the Court rejected AT&T's argument without addressing it, pointing to cases for the proposition that a court is not required to address every argument made by the parties. However, because the Court's order does not even mention the issue, neither Plaintiffs nor AT&T can say whether this was an intentional omission or an understandable oversight in light of the numerous issues raised in the parties' voluminous briefs. Either way, there is nothing improper about AT&T's request that the Court clarify the matter.

Finally, Plaintiffs suggest (at 3-5) that AT&T is improperly making new legal arguments about § 415. AT&T is making the same legal argument it made in its prior briefs. The fact that AT&T cited some more of the many cases holding that § 415 cannot be tolled by private agreement does not mean AT&T is making a new legal argument. For example, one of the cases AT&T previously cited (*see* ECF No. 97 at 29) was *American Cellular Corp. v. BellSouth*

Telecomm., Inc., 22 FCC Rcd. 1083, 2007 WL 268574 (FCC rel. Jan. 31, 2007), where the FCC held a private agreement could not toll § 415. In so holding, the FCC broke no new ground but relied on and cited the long line of authority that AT&T cited in its reconsideration motion, including *Armstrong Utilities*, *Midstate Horticultural*, *Municipality of Anchorage*, *Operator Communications*, *Valenti*, *Tele-Valuation*,[1] and *Communications Vending*. *See American Cellular*, 22 FCC Rcd. 1083 at nn. 55-58, 83. AT&T's citation of additional authority does not constitute a new legal argument.

In short, there is nothing improper about AT&T's motion.

B. Section 415(b) Cannot Be Tolled By Private Agreement.

The reason Plaintiffs spend so many pages urging the Court not to address the § 415 tolling issue is apparent from the rest of their brief: they have no real response on the merits.

Plaintiffs point (at 5) to the same three cases they previously cited, and complain that AT&T did not address them. But Plaintiffs first cited these cases in a reply brief (ECF No. 103 at 16-17), depriving AT&T of the opportunity to address them, and addressing them in AT&T's motion for reconsideration might have opened up AT&T to the charge that it was making new arguments. In any event, the Court does not need AT&T's assistance to see how wide of the mark these cases are, as none of them even confronted the question presented here. But since Plaintiffs fault AT&T for not addressing these cases, AT&T will briefly do so.

Only one of the three cases even involved a tolling agreement. In *Central Scott Tel. Co. v. Teleconnect Long Dist. Servs. & Sys. Co.*, 832 F. Supp. 1317, 1321 (S.D. Iowa 1993), the court held plaintiff's claim was timely under § 415(a) because the claim began to run on January 26, 1990, the due date of the bills at issue, and the parties had signed a tolling agreement

[1] In *Tele-Valuation* (¶ 6), the FCC cited the same legislative history that AT&T cites in its motion for reconsideration.

agreeing that the case was deemed filed on December 11, 1991 (less than two years thereafter). However, the court did not address the precedent holding that § 415 can't be tolled by agreement, and from the reported decision it does not appear the parties even raised that issue.

The other two cases did not even involve a tolling agreement. In *800 Services Inc. v. AT&T Corp.*, 30 Fed. Appx. 21, 23 (3d Cir. 2002), the court affirmed a holding that the "continuing wrong doctrine" did not apply to toll the plaintiff's claims under § 415(b), as "there was no continuing affirmative wrongful conduct during the statutory two-year period." The court did not address – much less question – the long line of authority holding that § 415 cannot be tolled by agreement. Nor did *Hoffman v. Rashid*, 2009 WL 5084098 (E.D. Penn. Dec. 28, 2009), address this issue. Rather, it rejected a plaintiff's attempt to invoke the continuing wrong exception, the relation back doctrine, the discovery rule, and equitable tolling to toll the application of § 415.

Finally, Plaintiffs' reliance on the "continuing wrong doctrine" is plainly misplaced. As the authority AT&T previously cited uniformly holds, for purposes of § 415, where a customer challenges amounts billed by a carrier, its claim accrues upon the receipt of each allegedly erroneous bill. *American Cellular*, 22 FCC Rcd. 1083 at ¶ 21. *See also, e.g., Valenti v. AT&T*, FCC 97-26, 1997 WL 818519, ¶ 19 (Feb. 26, 1997) (rejecting the proposition that plaintiff's "claim was somehow renewed with every additional bill"); *Operator Communications, Inc. v. Contel of the South, Inc.*, 20 FCC Rcd. 19783, 2005 WL 3369906, ¶ 11 (FCC rel. Dec. 9, 2005) ("It is well established that a customer's claim challenging the lawfulness of a carrier's charges accrues when the customer receives the carrier's bill containing the allegedly unlawful charges. Applying that rule here, a portion of OCI's damages claim accrued each time OCI received a

PICC bill from Verizon"). Applying that rule here, under § 415(b) Plaintiffs may not seek recovery of amounts billed more than two years before they filed suit.

C. The Level 3 and Broadwing Texas 12-Month Contractual Limitations Period Bars Those Plaintiffs' Claims For Amounts Billed Before *Talk America*.

Plaintiffs' brief highlights the parties' need for clarification from the Court regarding application of the 12-month limitations period in the Level 3 and Broadwing Texas contracts, as the parties plainly take differing views of the meaning of the Court's ruling.

The Court concluded that "[t]he occurrence which gave rise to the dispute was the Supreme Court's decision in *Talk America* per the reservation of rights and remedies embedded in the parties' ICAs," and "[b]y the terms of the ICAs, plaintiffs were therefore required to present their billing disputes within twelve months of the decision in *Talk America*." Dkt. #110 at 24. AT&T asks the Court to clarify that this means that because Plaintiffs did not file suit within 12 months after *Talk America*, Level 3 and Broadwing Texas cannot now challenge any amounts billed as of *Talk America*. Plaintiffs respond (at 8-10) by arguing they complied with this contractual restriction because they submitted some billing disputes to AT&T within four months after *Talk America*.

The Court should reject Plaintiffs' tortured interpretation. There is no dispute that some Plaintiffs submitted a small set of disputes to some of the AT&T defendants shortly after *Talk America*. But that is irrelevant for purposes of the contractual limitations provisions (as is Plaintiffs' assertion that submitting further disputes to AT&T would have been futile). The Level 3 contract states that "[n]o claims, under this Agreement or its Appendices, shall be brought for disputed amounts more than twelve (12) months from the date of occurrence which gives rise to the dispute." JA-38 (§ 10.1). In filing this lawsuit against AT&T, Level 3 indisputably "brought" a "claim" against AT&T "for disputed amounts." The contract thus expressly bars that claim to the extent it was brought more than 12 months after the date of the occurrence giving rise to the dispute, which the Court held was the issuance of *Talk America*.

While Plaintiffs submitted some disputes to AT&T within months after *Talk America*, that did not relieve them of their responsibility to actually bring their claims against AT&T within 12 months of *Talk America* under the ICA and this Court's ruling. Because they did not, the Court should hold that Plaintiffs' claims under the Level 3 and Broadwing Texas ICAs are barred to the extent they concern amounts billed before June 9, 2011, the date *Talk America* issued.

Conclusion

The Court should grant the relief requested in AT&T's motion for reconsideration and/or clarification.

Dated: May 8, 2017

Respectfully submitted,

By: /s/ Hans J. Germann

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CERTIFICATE OF SERVICE

Defendants filed a copy of the foregoing electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on this 8th day of May, 2017, upon the following:

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